

CASE NO. 1:04-CV-0169

Witucki claims that he can reopen the judgment based on the case of *Martinez v. Ryan*, ____ U.S. ____, 132 S. Ct. 1309 (2012). In *Martinez*, the Supreme Court held that inadequate assistance of counsel at initial review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel at trial. In the instant case, at Witucki's PCRA hearing, the incompetency of all three of Witucki's trial counsel was raised. In his § 2254 petition before this court, incompetency of trial counsel was raised. The petitioner does not state a procedural rule prevented him from raising incompetency of counsel in the state court.

There was no procedural default at the state court level. Witucki was not prevented from raising incompetency of counsel at his PCRA hearing and, in fact, it was raised. The *Martinez* case does not provide a vehicle to open the judgment of his court entered on June 7, 2004. The motion will be denied. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: October 24, 2012.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DANIEL R. WITUCKI, SR.,

Petitioner

v.

JOHN KERESTES, *et al.*,

Respondents

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ORDER

AND NOW, this 24th day of October, 2012, in accordance with the accompanying memorandum, **IT IS HEREBY ORDERED THAT** the motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (doc. 17) is **DENIED**. This court declines to issue a certificate of appealability.

s/Sylvia H. Rambo
United States District Judge